

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs July 28, 2009

STATE OF TENNESSEE v. MATTHEW SCOTT GREEN

Appeal from the Circuit Court for Blount County
No. C-15555 David R. Duggan, Judge

No. E2008-02576-CCA-R3-CD - Filed November 13, 2009

The Defendant, Matthew Scott Green, appeals the trial court's order revoking his probation for his Class C felony conviction of vandalism over \$10,000, ordering him to serve a year in jail, and extending his probation by one year. We hold that the trial court did not err and affirm its judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

J. Liddell Kirk, Knoxville, Tennessee (on appeal), and Raymond Mack Garner, District Public Defender (at trial), for the appellant, Matthew Scott Green.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Rocky H. Young, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The record reflects that the Defendant pled guilty to Class C felony vandalism and received a three-year, Range I sentence to be served as six months in jail and the balance on probation. Judgment was entered on January 20, 2006. On January 9, 2008, a violation warrant issued that alleged he had been arrested on a drug charge and had not reported the arrest to his probation officer, had failed to maintain or provide proof of employment, had failed to report to this probation officer, was delinquent in paying his fees, and failed to make consistent payments toward court costs and restitution. According to the court's January 18, 2008 order, the parties stipulated that the Defendant had violated his probation as alleged by the affidavit and agreed that the Defendant's probation would be revoked, that he would serve forty-five days in jail, and that "[t]he defendant shall be transferred from State Probation to Community Corrections for the balance of his sentence." On October 16, 2008, a community corrections violations warrant issued alleging that the Defendant tested positive for "THC admitted use" and failed to report to community service work the previous month.

The court conducted a hearing, at which the twenty-two year old Defendant testified that he supported himself and his pregnant fiancée doing lawn maintenance and landscaping. He said he failed the drug test that was the subject of the current violation warrant when he “made the mistake of trying [marijuana].” He said he was at the house of a person whom he did not know when the marijuana was offered to him. At first, he did not identify the acquaintance who offered him marijuana, although he later revealed the identity of the acquaintance. He denied having used marijuana any other time while he had been on supervision. He acknowledged, however, his previous revocation for marijuana possession. He claimed that on this earlier occasion, he found a bag of marijuana when he emptied a trash can at work, which he put in his pocket. He said that he was pulled over later that evening with the marijuana in his possession.

The Defendant testified that if the court gave him another chance, he planned to move into a home with his fiancée. He said he had full-time employment. He said that he did not perform community service the previous month because he mistakenly believed he had already fulfilled the requirement. He said that he had come to realize how his actions had hurt his family and that he was the only person who could provide for his fiancée. He said that he realized that he bore the responsibility for smoking marijuana and that he had learned to stay away from drugs from the experience. He said he had taken pre-tests for obtaining his GED but had not been able to afford the cost of taking the test.

The trial court found the Defendant had violated the terms of release. The court discredited the Defendant’s testimony. The court ordered him to serve an additional year of incarceration after which he would be released to enhanced probation, with the total probation to be increased by an additional year.

On appeal, the Defendant argues that the trial court erred by imposing the additional one year of confinement. He contends that the trial court erred in the previous revocation proceeding by placing him on community corrections and that it erred in the present proceedings, which he characterizes as a probation revocation, by ordering split confinement. The State responds that the trial court did not abuse its discretion.

A trial court may revoke a suspended sentence upon its finding by a preponderance of the evidence that a violation of the conditions of release has occurred. T.C.A. § 40-35-311(e) (2006) (probation revocation); see T.C.A. § 40-36-106(e)(3)(B) (stating that community correction revocation proceedings shall be conducted pursuant to T.C.A. § 40-35-311). The judgment of the trial court in a revocation proceeding will not be disturbed on appeal unless it appears that there has been an abuse of discretion. See State v. Williamson, 619 S.W.2d 145, 146 (Tenn. Crim. App. 1981).

In the present case, the record reflects that the Defendant violated two terms of probation. He admitted using marijuana and failing to report for community service. The record reflects that the Defendant had already been granted a reprieve in the first revocation proceeding, which also involved drug use, yet he failed to comply with the terms of release again. The trial court found the Defendant’s credibility lacking, which reflects poorly on his assurances he had learned from the

experience and intended to abide by the conditions if granted a further reprieve. The trial court did not abuse its discretion in revoking the Defendant's suspended sentence.

The question that remains is whether the trial court erred in ordering the Defendant to serve a year in jail and an additional year of probation. A trial court's authority varies in revocation proceedings depending on whether the case before it involves probation or a community corrections sentence. A trial court, upon revoking a community corrections sentence, "may resentence the defendant to any appropriate sentencing alternative, including incarceration, for any period of time up to the maximum sentence provided for the offense committed" T.C.A. § 40-36-106(e)(4). By contrast, a trial court revoking probation has the authority to extend the period of probation supervision for a period not to exceed two years; order execution of the original judgment; or, if the violation resulted in an additional conviction, order the new sentence to be served consecutively to the original judgment. T.C.A. §§ 40-35-308(c), -310, -311; State v. Hunter, 1 S.W.3d 643, 647 (Tenn. 1999). It cannot resentence the defendant. We also note that as a condition of probation, a defendant can be placed into a community corrections program. T.C.A. § 40-36-106(f).

In the present case, the judgment reflects that the Defendant initially received a split confinement sentence of jail and probation. When he violated the terms of his probation, the Defendant agreed to accept forty-five days in jail followed by transfer to the community corrections program. The court's order reflects that after serving the additional jail time, the Defendant was to be "transferred from State Probation to Community Corrections for the balance of his sentence." The Defendant now argues that his transfer from probation to community corrections was improper and that the trial court erred in the sanction it imposed because it was not proper as a consequence of a probation revocation.

A trial court lacks jurisdiction to impose a sentence of community corrections upon a finding that a defendant has violated probation, although the court may impose participation in a community corrections program as a condition of probation. State v. Bowling, 958 S.W.2d 362, 364 (Tenn. Crim. App. 1997); see T.C.A. § 40-36-106(f). We believe the trial court's order in the present case is ambiguous as to the court's intent. The order states that the Defendant shall be "transferred" from probation to community corrections. However, the record does not reflect that the court entered a modified judgment reflecting resentencing. Because the court lacked the authority to impose a new community corrections sentence, we interpret the trial court's January 18, 2008 order revoking the Defendant's probation and ordering him to serve forty-five days in jail and to be transferred to community corrections as modifying the conditions of the original judgment imposing jail confinement and probation to include participation in the community corrections program as a condition of probation. See Bowling, 958 S.W.2d at 364 (interpreting trial court's order placing the defendant on community corrections after revoking probation as imposing condition that the defendant participate in community corrections as a condition of probation).

We now consider whether the one year of jail and additional one year of probation imposed by the trial court were proper consequences of the probation revocation. The Defendant contends that the trial court could have ordered incarceration pursuant to the original three-year, Range I sentence or could have extended probation for up to two years, but the court had no authority to impose split confinement. He notes that the aggregate confinement imposed on him is nineteen

months, which is greater than the incarceration he would serve under the original three-year, Range I sentence with release eligibility at thirty percent.

We begin by noting that a split confinement sentence is not illegal simply because the jail period imposed is more lengthy than a defendant's release eligibility would be for a sentence to the Department of Correction (DOC). In State v. Sutton, 166 S.W.3d 686 (Tenn. 2005), the defendant challenged her three-year sentence of one year in jail and two years of community corrections on the basis the jail time imposed exceeded the release eligibility of 10.8 months for a three-year, Range I sentence to the DOC. The supreme court held that the parole statute for DOC sentences of more than two years created no right of parole upon attaining the release eligibility date, in contrast to the statutory mandate that a defendant sentenced to the DOC for two years or less "shall" be released upon reaching the release eligibility date. Therefore, the court held that the jail sentence exceeding the DOC release eligibility period was not illegal. Sutton, 166 S.W.3d at 690-91.

Under Sutton, we hold that the Defendant had no right to receive the lesser confinement period of a jail term versus the release eligibility date of a three-year DOC sentence. We note, as well, that the Defendant's argument bootstraps all of the periods of confinement that have been imposed upon him—the original six months, the forty-five days after the first revocation, and the one year after the present revocation. He has cited no authority for the proposition that the aggregate jail time imposed upon a defendant whose probation has been revoked cannot exceed the release eligibility period that a DOC sentence would involve. We believe Sutton and the statute empowering the trial court to impose additional confinement upon revocation defeat this argument.

We have also considered the Defendant's complaint that split confinement is not one of the options set forth in the statute and Hunter. However, this court has said that these authorities confer on the trial court the power to extend probation for a year, reinstate the defendant to probation, and order a period of confinement as a term of probation. State v. Stephanie Campbell, No. E2008-02581-CCA-R3-CD, Blount County (Tenn. Crim. App. Aug. 14, 2009).

Having concluded that the trial court had the legal authority to act as it did, we also hold that based upon the facts of the case, the trial court did not abuse its discretion in ordering an additional year of incarceration and extending the Defendant's probation by a year. The Defendant had a previous probation violation for drug use, and despite the forty-five days of jail time imposed and the increased supervision of the community corrections program, he again used drugs. He also failed to perform his community service work. Although the Defendant professed to have seen the error of his ways and claimed he mistakenly believed he had completed his community service requirements, the court found that the Defendant was not a credible witness.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

JOSEPH M. TIPTON, PRESIDING JUDGE